STATE OF MICHIGAN
IN THE SUPREME COURT
Michael J. Talbot, P.J., Richard Allen Griffin and Kurtis T. Wilder, J.J.

GREGORY HAYNES,

Plaintiff-Appellant,

Supreme Court No. 129206

v

MICHAEL J. NESHEWAT, ROBERT J. MURRAY AND BRIAN PELTZ,

Court of Appeals No. 249848

Wayne County Cir No. 01-137330-NO

Defendants,

and

OAKWOOD HEALTHCARE, INC. AND OAKWOOD HOSPITAL-SEAWAY CENTER.

Defendants-Appellees.

_____/

BRIEF OF AMICI MICHIGAN CIVIL RIGHTS COMMISSION AND MICHIGAN DEPARTMENT OF CIVIL RIGHTS

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Genevieve Dwaihy Tusa
Assistant Attorney General
Attorneys for Amici Michigan Civil Rights Commission and Michigan Department of Civil Rights
Cadillac Place Bldg., Ste. 10-200
3030 W. Grand Blvd.
Detroit, MI 48202
(313) 456-0200

Dated: September 15, 2006

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

Unpublished Opinions

INTRODUCTION

Plaintiff-Appellant Gregory Haynes is a physician whose surgical and clinical staff privileges were revoked at Defendant-Appellee Oakwood Hospital-Seagate Center. Haynes alleges the decision to revoke his staff privileges was racially motivated, and he filed suit alleging, among other things, a violation of Article III, the "public accommodations" provision, of the Michigan Elliott-Larsen Civil Rights Act[1]. The Defendants argued, and the Court of Appeals mistakenly agreed, that a public accommodation claim is not viable in this case because a hospital is not a place of public accommodation in regard to its relationship to physicians with staff privileges. Rather, argues the Court of Appeals, this is a matter of private contract between Haynes and the Defendants.[2]

This brief addresses the narrow legal issue of whether a cause of action exists under Article III of Elliott-Larsen to protect Haynes and similarly situated plaintiffs from illegal discrimination regardless of their private relationship with a public entity like a hospital. Amici, the Michigan Civil Rights Commission and the Michigan Department of Civil Rights, believe that a cause of action does exist, and that the Court of Appeals erred in its decision for the following reasons: (1) Under both the plain language of Elliott-Larsen and Michigan case law, a hospital or hospital facilities like the Defendants in this case, constitute places of public accommodation, and are subject to the anti-discrimination prohibitions of Article III; (2) Under both the plain language of Elliott-Larsen and relevant Michigan and Federal case law, Haynes and similarly situated plaintiffs qualify as either "individuals" or "members of the public" who are protected from illegal discrimination under Article III, regardless of their private contractual relationship with a Defendant; and (3) Public policy dictates that where individuals like Haynes,

---

[1] MCL 37.2101 et. seq.

[2] Haynes is concededly not an employee of the Defendant, and therefore, does not have a cause of action under Article II, the employment section of Elliott-Larsen.

who are in essence in employer-employee relationships with the Defendant, but who are concededly not employees as defined under state law, and therefore do not have a cause of action under the employment section of Elliott-Larsen, must have a remedy to sue for illegal discriminatory actions otherwise prohibited by Elliott-Larsen. Apart from these issues, Amici do not take a position on the factual issues presented in this case, and have no stake in the outcome of this case.

STATEMENT OF FACTS

Amici Curiae adopt by reference the Statements of Facts of Plaintiff-Appellant.

STATEMENT OF INTEREST

Amici accept this Court's invitation to submit this amicus brief. We believe that the Court of Appeals holding in this case, that a hospital is not a place of public accommodation in regard to its relationship with physicians with staff privileges, is in violation of both the legislative intent and the plain language of the Michigan Civil Rights Act. The Court's decision unwittingly provides public hospitals – places that are without question places of public accommodation as defined under Elliott-Larsen – a "dual status," making them private in some respects and public in others. This distinction was not intended by the Legislature, nor does the plain language of the Act provide for it. The Court of Appeals decision also precludes the possibility of a viable civil rights action merely because a potential claimant is in a private contractual relationship with a public institution. Amici find no basis in the law for these conclusions, and argue that for an individual to lose protection under the civil rights laws because they happen to be in a private contractual relationship with a public institution, denies them lawful protection from potentially discriminatory conduct clearly prohibited by Elliott-Larsen and other state civil rights laws.

ARGUMENT

I. Article III of the Michigan Elliott-Larsen Civil Rights Act states that it is illegal to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of places of public accommodation in Michigan. The Court of Appeals erred when it found that a hospital like the Defendant in this case was not a place of public accommodation in regard to its relationship with physicians with staff privileges, and was not subject to the anti-discrimination prohibitions of Article III of Elliott-Larsen.

A. The rules of statutory construction dictate that hospitals are places of public accommodation subject to the anti-discrimination provisions of Article III of Elliott-Larsen, and likewise, that physicians are individuals who are protected under Article III's provisions.

First and foremost, Amici argue there is no valid dispute that a hospital constitutes a "place of public accommodation" as that term is defined under Elliott-Larsen. Article III defines "place of public accommodation" as[3]:

> [A] business, or an educational, refreshment, entertainment, recreation, **health or transportation facility**...whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. (emphasis added)

Clearly, a hospital is a business or health facility. Furthermore, the Act states in relevant part with regard to discrimination in public accommodations[4]:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Reading these two sections together, Amici argue it cannot be genuinely disputed that the opportunity to practice medicine at a hospital falls within the scope of the "services . . . privileges, [or] advantages" provided by a hospital, which is a "business" or "health facility" open to the public.

---

[3] MCL 37.2301.
[4] MCL 37.2302(a).

The Court of Appeals, however, attempts to redefine the nature of a hospital and a physician in the context of Article III, holding that a hospital is not a public accommodation with respect to physicians with staff privileges. The Court argues that because the entire general public does not have access to medical privileges, the hospital is somehow transformed into a private institution for discrimination purposes. This interpretation defies the plain language of the Act, and results in a hospital being considered a public accommodation for some purposes, but not a public accommodation for others, thus creating a "dual status" facility, where some individuals are covered under Elliott-Larsen, while others are not. This is a strained, artificial, judicially-constructed interpretation of the statutory language, and is inconsistent with both the intent and the plain language of Elliott-Larsen.

Amici submit that the Court of Appeals holding conflicts with the well-established rules of statutory construction, which is "to determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished."[5] As is the case here, judicial construction is neither required nor permitted, and a court must apply the statute as written, if the statutory language is clear and unambiguous.[6] Only when a statute is ambiguous may this Court go beyond the words of the statute to determine legislative intent.[7] Here, there is no ambiguity in Article III with respect to the nature of a hospital as a public accommodation. There is simply no authority in the text of Elliott-Larsen creating an exception for hospitals or other like facilities to hold a "dual status" when it comes to defining an institution as a place of public accommodation. Nor is there any language to support the proposition that a physician is no longer a member of the general public for purposes of a civil rights claim. Such interpretations unnecessarily narrow the scope of

---

[5] *Gross v General Motors Corp*, 448 Mich 147, 158-9; 528 NW2d 707 (1995).
[6] *Tryc v Michigan Veterans Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996).
[7] *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

Elliott-Larsen, and create a result that directly conflicts with the intent of the Legislature and the purpose of the Act – to prohibit illegal discrimination against protected individuals – *which include physicians with staff privileges.*

B. Michigan case law establishes that hospitals are places of public accommodation subject to the anti-discrimination provisions of Article III of Elliott-Larsen.

In addition to the fact that the statutory interpretation by the Court of Appeals is inconsistent with the plain and unambiguous language of Elliott-Larsen, over twenty years ago, Michigan courts recognized that a hospital is a place of public accommodation for purposes of Elliott-Larsen in *Whitman v Mercy Hospital.*[8] In *Whitman*, the plaintiff was a pregnant woman who was allegedly denied access to a delivery room based on her marital status. The Court of Appeals attempts to distinguish this case from *Whitman* by creating a distinction between a "public" area of the hospital (a delivery room) and the right to enter a hospital to practice medicine, which it contends is only available to some portion of the public, i.e., physicians. The Court of Appeals concludes that because the "general public" cannot avail themselves of physician staff privileges, this somehow transforms a hospital into a facility that is no longer available to the public for purposes of a discrimination claim. This requires a conclusion that a place of public accommodation may be public in some respects, while private in others. But Elliott-Larsen does not provide for this kind of a "dual status" facility, and neither the Appellee nor the Court of Appeals, offers any law or sound logic creating such a distinction.

More troublesome is that the Court of Appeals is attempting to define a place of public accommodation not by its inherent nature (that is, what general services it may provide -- in this

[8] *Whitman v Mercy Hospital*, 128 Mich App 155, 157-162; 339 NW2d 730 (1983).

case, health services at a hospital), but by deferring to the specific nature of the relationship a claimant may have with that institution. This definition is confusing and ill-founded. For example, in this case, the Court of Appeals stated that "there is no material dispute on the record that staff medical privileges . . . are not made available to the public."[9] This they distinguish from the delivery room in *Whitman* – which they say is available to the "general public." Therefore, says the Court of Appeals, the hospital does not constitute a place of public accommodation under our facts. Amici disagree with this proposition for two reasons. First, the Court concludes that physicians are not members of the general public. Amici argue that physicians plainly qualify as members of the general public. Second, the Court's reasoning suggests that every member of the general public must always be able to avail himself or herself to the "privilege" or "service" at issue in order to make an institution qualify as public. Amici contend there is no statutory language supporting this interpretation, and leads to unsound results. For, while this case involved a doctor with staff privileges, there are many other potential claimants and scenarios that could lead to other members of the general public being denied the right to a lawful action for a violation of their civil rights under the Court of Appeals reasoning. Even in the hospital setting, not only doctors, but nurses, custodians, hospital volunteers may have access to the hospital to perform certain duties that other members of the general public do not have access to. Nonetheless, they may not be in a traditional employment relationship with the hospital – and are still considered members of the "general public". Under the Court of Appeals rationale a hospital could violate their civil rights without recourse. One simple example is a library – undisputedly a place of public accommodation – that advertises for a voluntary librarian position. The candidates must hold a bachelor's degree in library science

[9] *Haynes v Neshewat*, unpublished opinion per curium of the Court of Appeals, issued June 23, 2005 (Docket No. 249848) (Exhibit A).

from an accredited university to qualify. A woman alleges she was denied the volunteer position based on her gender. She admittedly would not fall under the employment section of Elliott-Larsen (it is a voluntary position, among other things). This should not mean she has no recourse to file a civil rights claim. Like physicians, only a small percentage of the general public hold library science degrees. This does not transform the library into a private facility, and the woman into an individual who no longer qualifies as a "member of the general public." Like Haynes, the woman candidate is in a special relationship with the library, but this fact does not magically transform the library or the woman into a place or person not subject to the prohibitions or protections of Elliott-Larsen.

II. The Court of Appeals erred when it found that a person like Dr. Haynes is not an individual or member of the public who is protected from unlawful discrimination under Article III because he is in a contractual relationship with the Defendant.

A. The mere fact that a contractual relationship exists between Haynes and Defendants does not preclude Haynes's discrimination claim.

The Court of Appeals essentially argues that because of Haynes's private contractual relationship with the hospital, Haynes is no longer a "member of the public" who can avail himself of the protections of Article III. But the plain language of Section 302(a) does not limit its protection to "members of the public"; rather, by its own terms, the statute protects the rights of the *individual.*[10] In any event, Amici argue that Haynes does not lose his status as a protected "member of the public" under the facts of this case. Nowhere in the Act or its legislative history is there mention of any sort of "business relationship" that would preclude an individual, like a physician in this case, from asserting a discrimination claim if denied access to any of the "privileges," "services," or other accommodations offered at a place of public accommodation.

[10] MCL 37.2302(a).

To that end, the Court of Appeals' reliance on *Kassab v Michigan Basic Prop Ins Ass'n*,[11] for the argument that Haynes's contractual relationship with the hospital precludes his civil rights claim, is misplaced. In *Kassab*, a plaintiff who purchased a fire insurance policy was denied a claim for damages on the basis that his claim was in excess of his policy limits, and filed a discrimination claim under Article III. The *Kassab* court held the plaintiff failed to state a claim under Article III arguing that "the focus . . . of that section of the Civil Rights Act is primarily *on denial of access* to a place of public accommodations or public services."[12] The court held that "the gist of plaintiff's claim is breach of contract. Because access to insurance coverage was not denied . . . it is beyond the legislative purpose to provide a civil rights action under the public accommodations section of the act for breach of contract in claims processing."[13] The Court of Appeals likened *Kassab* to the present case by asserting that both involve matters of private contract between the parties, bringing their situations out of the ambit of the public realm.

At the outset, Amici must declare its fervent disagreement with the majority opinion in *Kassab*. Amici strongly disagree with the notion that the mere fact that a contractual relationship may exist between Haynes and the defendant hospital facilities precludes an otherwise valid discrimination claim. Of course, in this case, there was no employment contract that was breached, because Haynes was not an employee of the hospital. But even so, had there been some kind of contractual argument posited by Haynes, that would not prevent him from filing a separate discrimination claim alleging that the facts behind the breach of contract were the same facts that led to a violation of his civil rights. There is no basis for the argument that an individual member of the public loses protection under the civil rights statutes as soon as he or she enter into a contract with a public entity. The existence of a potential contractual claim is

[11] *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433; 491 NW2d 545 (1992).
[12] *Kassab,* 441 Mich at 439 (emphasis in original).
[13] *Kassab,* 441 Mich at 439.

completely irrelevant to the existence of a viable discrimination claim, which rests on a statutory basis separate and distinct from the legal basis of a contractual claim. The basis of the discrimination claim is not that the Defendants breached their private contract with Haynes, but rather the revoking of his staff privileges was motivated by racial animus against Haynes.

In fact, contrary to *Kassab* and the Court of Appeals decision in this case, this Court has held that a person does not lose his status as a member of the public due to the existence of a private relationship. In *Kerbersky v Northern Michigan University,*[14] plaintiff was a construction worker who fell off an allegedly defective ladder affixed on the roof of a Northern Michigan University Administration Building.[15] The plaintiff had been working on a building that remained open to the public during renovation. Defendant argued that plaintiff's gross negligence claim was barred by government immunity principles because the roof of the building was not open to the public and that plaintiff was on site as an employee of the subcontractor on the construction site and therefore was not a "member of the public." This Court rejected defendant's argument, finding that "[m]embers of the public do not lose their right to be protected simply because they come to a public building to perform work . . . [T]he fact that Kerbersky was a construction worker did not deprive him of his status as a member of the public." [16] Like the plaintiff in *Kerbersky*, Haynes does not lose his status as a member of the public simply because he may have contracted to perform work at the Defendant hospital in this case.

But, even if this Court chooses to follow the *Kassab* logic and ignore *Kerbersky*, Amici argues this case is not one of private contract: Haynes was not an employee of the hospital, and

---

[14] *Kerbersky v Northern Michigan University*, 458 Mich 525, 537; 582 NW 2d 828 (1998).

[15] *Kerbersky,* 458 Mich at 526-527.

[16] *Kerbersky,* 458 Mich at 537.

the "gist" of Haynes's claim is not a breach of contract, but rather an actual *denial of access*. Haynes is not alleging a breach of employment contract (as *Kassab* was arguing breach of insurance contract). Rather, he is alleging he has been *denied access* to hospital privileges based on his race. For these reasons, Amici urge this Court to find that the Court of Appeals reliance on *Kassab* is ill-founded.

B. **In deciding Haynes's discrimination claim under Elliott-Larsen, this Court should follow the analysis used by the Third Circuit in *Menkowitz*, which found that a doctor had a cause of action under Title III of the Americans with Disabilities Act, when he alleged that he was denied access to staff privileges on the basis of his disability.**

As a preliminary matter, there is no Michigan case law interpreting Elliott-Larsen in relation to the issue of whether a physician who is denied hospital staff privileges qualifies as an individual or member of the pubic protected under Article III. However, in *Menkowitz v Pottstown Memorial Medical Center*,[17] the Third Circuit has decided this issue under Title III of the American with Disabilities Act (ADA).[18] It determined that a physician like Haynes was entitled to protection under that statute. Because the provisions of the ADA are very similar to those under Elliott-Larsen in this case, this Court should follow the analysis of *Menkowitz*, and hold that Haynes is covered under the Michigan act.[19]

In *Menkowitz*, a physician alleged a violation of Title III of the ADA, arguing that the defendant discriminated against him on the basis of his disability by denying him the opportunity to participate in medical staff privileges. Like the Defendants in this case, the Defendants in *Menkowitz* argued that plaintiff had no cause of action because he was not a "member of the

---

[17] *Menkowitz v Pottstown Memorial Medical Center,* 154 F3d 113 (US 3rd Cir 1998)
[18] 42 USC § 12101.
[19] In interpreting claims of discrimination under Elliott-Larsen, Michigan Courts often look to federal precedent for guidance. See *Dep't of Civil Rights ex rel Cornell v Sparrow*, 423 Mich 548; 377 NW2d 755 (1985); *See also Boscaglia v Michigan Bell*, 420 Mich 308, 323; 362 NW2d 642 (1984).

public" denied access to the hospital. Rather, because he was a physician, he was somehow ejected from the general public into a group not covered from discrimination under the Act. The Third Circuit rejected this analysis. Amici believe the facts of this case are akin to those in *Menkowitz*, and the reasoning of the Third Circuit should be followed by this Court.

The language of Title III reads substantially the same as Section 302(a) of Elliott-Larsen at issue in this case[20]:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by an person who owns, leases (or leases to), or operates a place of public accommodation.

A place of public accommodation is defined earlier to specifically include a hospital.[21] Like the ADA, Elliott-Larsen protects "individuals" from the full and equal enjoyment of places of public accommodation.[22] The Court of Appeals attempted to make a substantive distinction between a place of public accommodation under Elliott-Larsen and the ADA. Once again, the Court of Appeals strained to find substantive distinctions where none exist. As Amici have argued above, the Court's reasoning is ill-founded; there is no substantial difference between the State and Federal definitions of public accommodation under the facts of this case. Furthermore, the reasoning of the Third Circuit in *Menkowitz* is sound and this Court should adopt it and hold that Haynes is an individual covered under Elliott-Larsen and that the defendant hospital is in fact a place of public accommodation as defined under the Act.

---

[20] 42 USC § 12182(a).
[21] *See* 42 USC § 12181 (7).
[22] MCL 37.2102.

III. Public policy dictates that individuals like Dr. Haynes are protected under Elliott-Larsen. A decision against Haynes would create a gap in the law that would disregard the legislative intent of Elliott-Larsen and leave physicians who are similarly situated to Haynes unable to find protection for issues of discrimination.

Finally, Amici argue that should the Court of Appeals decision stand, it raises the specter of creating a gap in the civil rights laws that was not intended by Legislature, and that could leave innumerable individuals unprotected from potential civil rights violations. The rationale of the ruling reaches far beyond physicians with staff privileges; it could affect many individuals – members of the public at large – who happen to enter into contractual or quasi-contractual relationships with public entities that clearly constitute a place of public accommodation. In today's employment market, the relationship between employer and employee is becoming increasingly blurred. There are more and more "independent contractors" and fewer full-time employees, whether it be in a hospital, university, or corporate setting. Many individuals who do not fall within the legal definition of "employee" under Elliott-Larsen or other state statutes, may allege potentially valid claims of discrimination. If the Court of Appeals ruling is upheld, a large section of the public may be unprotected from such violations. This defeats the very purpose behind Elliott-Larsen, which was enacted to protect the public from discriminatory animus. Public policy dictates that our courts acknowledge these claims and preserve the rights of individuals who are undeniably protected under Michigan's civil rights laws.

CONCLUSION

This Court should reverse the Court of Appeals, and hold that hospitals are places of public accommodation in regard to their relationship with physicians with staff privileges, and that persons like Dr. Haynes are protected individuals under the public accommodations provision of the Michigan Civil Rights Act. The mere fact that plaintiffs, like Dr. Haynes, are in a contractual relationship with an entity like the Defendant Hospital, does not leave them unprotected from illegal discrimination. Nor does it transform an entity like a hospital, which is ordinarily considered a place of public accommodation, into a private entity that is not subject to the anti-discrimination provisions of Elliott-Larsen. If the Court of Appeals decision stands, it could not only cause the civil rights laws to be applied inconsistently, but it could leave unprotected a large group of individuals from illegal discrimination.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Genevieve Dwaihy Tusa
Assistant Attorney General
Attorneys for Amici Michigan Civil Rights Commission and Michigan Department of Civil Rights
Cadillac Place Bldg., Ste. 10-200
3030 W. Grand Blvd.
Detroit, MI 48202
(313) 456-0200

Date: September 15, 2006

civrgts/asign/cases/open/haynes/S Ct Brief9-13-06